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DATO' SERI ANWAR IBRAHIM

v.

TUN DR MAHATHIR MOHAMAD

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HELILIAH MOHD YUSOF JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: W-02-609-2007]

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15 AUGUST 2008

CIVIL PROCEDURE: *Appeal - Appeal Record - Draft Index to Appeal Record and Exhibits thereto - Determination of - Whether to be determined by Registrar of High Court - Whether no room for judicial*

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activism by Court of Appeal - Rules of Court of Appeal 1994, r. 18(6), (4) - Courts of Judicature Act 1964, s. 44

The appellant, having successfully applied for leave for extension of time to file and serve the Record of Appeal, had now applied

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to have the Index of the Record of Appeal and the exhibits thereto determined by the Court of Appeal. The application was predicated upon allegations that certain exhibits sought to be included were irrelevant, and that since the exhibits were cases which had actually been reported, they ought to be integrated into

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the respondent's bundle of authorities. The facts showed however that the application was the appellant's second attempt to beseech the Court of Appeal to so intervene, having earlier applied for the same and obtained a direction for the matter to be resolved by the Registrar of the High Court pursuant to r. 18(6) Rules of the

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Court of Appeal 1994 ('COA Rules'). In the circumstances, before the learned justices of appeal, a question necessarily arose as to whether judicial intervention by the appellate bench was justifiable or called for.

Held (dismissing application)

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Per Heliliah Mohd Yusof JCA delivering the judgment of the court:

(1) Rule 18(6) of the COA Rules has expressly conferred on the Registrar of the High Court the authority to make a

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determination on the inclusion or exclusion of any document. The registrar is also empowered to decide whether the parties

should or should not be referred to a judge which in this case the registrar has decided that the matter should not. (para 16)

(2) Rules 18(4) and (6) of the COA Rules have expressly provided what documents are to be included and state that in the event of disagreement between the parties, it is the High Court which is the judicial authority to make a determination. Hence there is no question of the Court of Appeal intervening on such a question. To do that would be tantamount to the Court of Appeal derogating to itself some discretion already conferred by the COA Rules to the High Court where the appeal records are to be finalised. Even if there were to be some form of *casus omissus* it is not for this court to fill it in. (para 19)

(3) Section 44 of the Courts of Judicature Act 1964 is inapplicable and therefore there is no question of this court invoking some inherent jurisdiction obliquely. This is even more apparent considering that there is no provision equivalent to r. 137 of the Rules of the Federal Court 1995 that could be invoked by this court. There is no room here for judicial activism as it would be tantamount to rewriting the Rules for the convenience of the parties. (para 20)

[Application for determination disallowed.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu, setelah berjaya memohon kebenaran untuk melanjutkan masa bagi memfail dan menyerahkan rekod rayuan, kini memohon supaya Indeks Rekod Rayuan serta eksibit kepada indeks tersebut diputuskan oleh Mahkamah Rayuan. Permohonan didasarkan kepada pengataan bahawa beberapa eksibit yang hendak dimasukkan adalah tidak relevan, dan bahawa oleh kerana eksibit-eksibit tersebut merupakan kes-kes yang dilaporkan maka ia selayaknyalah dimasukkan ke dalam ikatan autoriti responden. Fakta bagaimanapun menunjukkan bahawa permohonan di sini adalah permohonan perayu yang kedua untuk campurtangan Mahkamah Rayuan dalam perkara sama, di mana, dalam permohonan terdahulu, Mahkamah Rayuan telah memerintahkan supaya halperkara diputuskan oleh Pendaftar Mahkamah Tinggi di bawah k. 18(6) Kaedah-kaedah Mahkamah Rayuan 1994 ('Kaedah

A MR'). Oleh yang demikian, di hadapan yang arif hakim-hakim rayuan, soalan berbangkit sama ada campurtangan kehakiman oleh mahkamah semasa sesuatu yang berjustifikasi atau wajar.

Diputuskan (menolak permohonan)

B **Oleh Heliliah Mohd Yusof HMR menyampaikan penghakiman mahkamah:**

(1) Kaedah 18(6) Kaedah MR secara khusus memberi kuasa kepada Pendaftar Mahkamah Tinggi untuk membuat penetapan mengenai kemasukan atau pengeluaran dokumen-dokumen. Pendaftar juga diberi kuasa untuk memutuskan sama ada pihak-pihak harus dirujuk kepada hakim ataupun tidak di mana dalam kes ini pendaftar memutuskan untuk tidak berbuat demikian.

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(2) Kaedah-kaedah 18(4) dan (6) Kaedah MR secara khusus memperuntukkan apakah dokumen-dokumen yang perlu dimasukkan dan menyatakan bahawa jika berlaku apa-apa pertikaian di antara pihak-pihak, maka mahkamah yang mempunyai kuasa kehakiman untuk membuat keputusan adalah Mahkamah Tinggi. Oleh itu tidak berbangkit soal Mahkamah Rayuan harus menangani persoalan seperti itu. Berbuat demikian bermakna Mahkamah Rayuan merampas untuk dirinya kuasa-kuasa tertentu yang diberikan oleh Kaedah MR kepada Mahkamah Tinggi dimana rekod rayuan harus dimuktamadkan. Jikapun wujud sebarang bentuk *casus omissus* tugas memenuhinya tidak terletak ke atas mahkamah ini.

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(3) Seksyen 44 Akta Mahkamah Kehakiman 1964 tidak terpakai dan oleh itu tidak timbul soal mahkamah ini menggunapakai bidangkuasa sedia ada dengan secara tidak langsung. Ini menjadi lebih ketara mengambilkira bahawa tidak wujud peruntukan seperti k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995 yang boleh digunapakai oleh mahkamah ini. Maka tiada ruang untuk sebarang aktivisma kehakiman kerana berbuat demikian bererti menulis semula kaedah-kaedah semata-mata untuk menyelesakan pihak-pihak.

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[Permohonan untuk pemutusan tidak dibenarkan.]

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Case(s) referred to:
Re Sateras Resources (Malaysia) Bhd [2006] 2 CLJ 489 CA ***(dirujuk)***

Legislation referred to:
Courts of Judicature Act 1964, s. 44
Rules of the Court of Appeal 1994, rr. 4, 18(4), (6)
Rules of the Federal Court 1995, r. 137

For the appellant - Sankara Narayanan Nair (Wan Anuar Shaddat Mohamed Amin, YM Raja Aziz Addruse & Dato' Param Cumaraswamy with him); M/s SN Nair & Partners
For the respondent - VK Lingam (VK Lashmi with him); M/s VK Lingam & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S4-23-15-2006]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Heliliah Mohd Yusof JCA:

[1] Enclosure 4(a) was a notice of motion which was filed by the appellant/applicant and contained two prayers. The first (prayer (a)) sought leave for extension of time to file and serve the record of appeal. This was granted without any difficulty or objection from the respondent (that is in respect of both the appeal and the motion itself). Hereafter both parties are to be referred as the appellant and respondent.

[2] It is the second prayer (prayer (b)) which has raised issues which warrant written grounds being furnished. In prayer No. 2 the appellant was seeking that the Index of the Appeal Record and the exhibits thereto are to be determined by the Court of Appeal.

[3] Due to the unusual nature of the application it is very necessary to divulge the background leading to this application.

[4] It was explained, before us, when the matter was being heard that previously on 29 January 2008 the same application had also been heard by another panel of the Court of Appeal. It was determined then that pursuant to r. 18(6) of the Rules of the Court of Appeal 1994 the matter should be determined by the

Registrar of the High Court as specifically provided therein. Rule 18(6) of the Rules of the Court of Appeal 1994 (COA Rules 1994) states:

> 18(6) A draft index of the documents to be included in the record of appeal shall be sent by the appellant's solicitors to the solicitors for the respondent who or (if more than one) any of whom may within forty-eight hours object to the inclusion or exclusion of any document. In the event of the parties being unable to agree, *the matter shall be referred to the Registrar of the High Court who may require the parties to attend before a Judge of the said Court. The Registrar of the High Court as well as the parties shall endeavour to exclude from the record all documents* (more particularly such as are merely formal) that are not relevant to the subject matter of the appeal taking special care to avoid the duplication of documents and unnecessary repetition of headings and other merely formal parts of documents. Where in the course of preparation of the record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists on its being included, the record, as finally printed or typed shall, with a view to the subsequent adjustment of the costs of and incidental to such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to. (emphasis added)

[5] The matter has been argued before the Registrar of the High Court on 3 April 2008 who by a decision delivered on 9 April 2008 ordered that all exhibits in the respondent's affidavit in support must be included. The respondent's affidavit in support in the context of the appellant's case refers to the affidavit in support filed by the respondent dated 4 January 2007 in furtherance of the respondent's application to strike out dated 5 January 2007. The application to strike out was made in response to a defamatory action instituted by the appellant against the respondent in Civil Suit No. S4-23-15-2006. The respondent was successful in the application to strike out and hence an appeal was lodged by the appellant.

[6] It was in the course of finalising the index to the record of appeal that the appellant had sought to exclude certain exhibits. Exhibits were to be incorporated as Part C of the record of appeal. Learned counsel for the appellant by letter dated 15 August 2007 had transmitted a copy of the Draft Index of the

Record of Appeal to the learned counsel for the respondent for approval. By a letter dated 20 August 2007 counsel for respondent then sent a reply which stated *inter alia*:

> ... Please note that you have omitted the following Exhibits as exhibited in the Defendant's supporting affidavit dated 4.01.2007. Kindly take notice that if the Exhibits are not included in the Appeal Record we will consider that the Appeal Record is incomplete and defective and our client will take steps to strike off your client's Appeal.

[7] It is noted that in the same letter learned counsel for the respondent enclosed an amended Draft Index enclosing the list of exhibits that had been omitted in the Draft Index of Exhibits prepared by learned counsel for the appellant.

[8] The amendment that was suggested to be included in Bahagian C Indeks Rekod Rayuan as suggested specifies as follows:

> 16. Senarai Ekshibit-Ekshibit Plaintiff (Defendant?)
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> Ekshibit-Ekshibit "MM-1" hingga "MM-20" seperti yang dilampirkan muka surat 1 hingga muka surat 5.

[9] Learned counsel for the appellant in response to this suggestion countered, *inter alia* as follows in the letter dated 21 August 2007:

> ... We are however not agreeable to paragraph 8, 20, 22, 23, 25 to 27 as they are cases and ought to be rightfully placed in your bundle of authorities. We are also not agreeable to paragraphs 26 as we do not wish to make reference to them at all and such we suggest that you make your own copies of the same for your reference at the appeal.

[10] This same letter of 21 August 2007 also included a suggestion that the parties seek an appointment with the registrar for directions.

[11] As elucidated above the outcome of the endeavours to finalise the draft index for the appeal record resulted not only in a previous application being made before the Court of Appeal and a direction for the matter to be emplaced before the Registrar of the High Court pursuant to r. 18(6) COA Rules 1994.

[12] Enclosure 4(a) therefore constitutes a second attempt by the appellant seeking the Court of Appeal to determine (ditentukan oleh mahkamah) the Index to the record of appeal and its exhibits.

[13] Learned counsel for the appellant has indicated that several of the exhibits that are sought to be included are irrelevant. The exhibits are identified as "MM1" to "MM20". Objections are being made to exhs. "MM8", "MM20", "MM22", "MM23", "MM25" to "MM27".

[14] Objections to these exhibits are premised on the basis that those exhibits being cases which have been fully reported and hence should actually become part of the respondent's bundle of authorities. The learned counsel for the appellant has submitted that the respondent's application to strike out the action on defamation was grounded on estoppel and hence arising from the High Court decision to strike out the writ, it would accordingly render further reference to those decision which include decision made by the Federal Court irrelevant. Entwined to this is the submission that the resultant effect would be 24,000 pages of documents might have to be brought in. Reliance is emplaced on the following provision of the COA Rules 1994 that r. 18(4) which states:

> (4) The appellant **shall** attach to such memorandum **copies of the proceedings in the High Court** including
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> (c) copies of all affidavits read and of all documents put in evidence in the High Court **so far** as **they are material** for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified transaction thereof.

[15] It is clear from the abovementioned provision that the appellant is the party ascribed with the responsibility of attaching the documents. As pointed out by the learned counsel for the respondent, there is no question here of the respondent preparing and attaching some form of supplementary record incorporating the exhibits objected to by the appellant. The point however on the determination of what is material or otherwise has been dwelt upon in *Re Sateras Resources (Malaysia) Bhd* [2006] 2 CLJ 489 the relevant passage in the statement of Abdul Kadir Sulaiman JCA is:

> On the issue of the breach of the various provisions of the Court of Appeal Rules 1994, this court in *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309 held that the word "shall" used in r. 18 (4)(c) of the Rules reflects a measure of mandatoriness in it. This is a mandatory rule and must be strictly adhered to. Since the rule speaks of 'all documents put in evidence', this meant that the appellant had to include all the exhibits produced before the High Court. It was not for the appellant's counsel to decide or say that only two exhibits were material. It was for the court to decide which exhibits were material and relevant to the appeal. The court also held that the importance of the rules of the court cannot be ignored as otherwise the courts would be faced with endless problems involving the administration of justice.

[16] In the circumstances of this arising from the objections posed by the appellants to the inclusion of several exhibits the matter has in accordance with r. 18(6) already been referred to the Registrar of the High Court. This rule is in itself a statutory provision which has expressly conferred on the Registrar of the High Court the authority to make a determination on the inclusion or exclusion of any document. The registrar is also empowered to decide whether the parties should or should not be referred to a judge which in this case the registrar has decided that the matter should not.

[17] Learned counsel for the appellant has contended that there is here simply a matter of interpretation of the COA Rules 1994. This is indeed what this court is required to do. However in addition to the aforementioned the following are the additional reasons.

[18] Rule 4 of COA Rules 1994 provides:

> 4. Where no other provision is made by any written law or by there Rules, the procedure and practice in the Rules of the High Court 1980 shall *mutatis mutandis* apply.

[19] Rule 18(4) and r. 18(6) have expressly provided what documents are to be included and in the event of disagreement between the parties, it is the High Court which is the judicial authority to make a determination. Hence there is here no question of the Court of Appeal intervening on such a question. It would be tantamount to the Court of Appeal derogating to itself some discretion already expressly conferred by the COA

A Rules 1994 to the High Court where the appeal records are to be finalised. Even if there were to be some form of *casus omissus* it is not for this court to fill it in.

[20] The parties have conceded that s. 44 of the Courts of
B Judicature Act 1964 is also inapplicable. There is therefore no question here of invoking some inherent discretion obliquely. This becomes even more apparent in view of the fact that there is no provision equivalent to r. 137 of the Rules of the Federal Court 1995 that could be invoked by the Court of Appeal. To
C emphasise the matter, there is no room here for judicial activism as it would be tantamount to re-writing the rules for the convenience of the parties.

[21] Consequently prayer (b) in encl. 4(a) is disallowed while
D prayer (a) is allowed.

[22] Learned counsel for the respondent has requested this court to put on record that the question of costs to be borne following from the inclusions of the exhibits will be an issue that will be raised before the Court of Appeal when the appeal proper is
E being heard.

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